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PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS FOR MAY.

Edited by ARDEMUS STEWART.

Bailment, Hotel-keeper

A hotel-keeper, in whose safe a regular boarder deposits money for safe keeping, is no more than a bailee for him, and when the money is stolen from the safe by his night clerk, is not liable therefor, in the absence of any proof of want of ordinary care in employing him: *Taylor* v. *Downey*, (Supreme Court of Michigan,) 62 N. W. Rep. 716.

When the proprietor of a hotel employs a servant to receive and keep the property of guests while at meals, his liability for the default of this servant in the custody of property so received is not affected by the fact that he has also provided a check-room for the safe-keeping of such property: *Labold* v. *Southern Hotel Co.*, 54 Mo. App. 567.

Ballots, Special Elections

As the Australian Ballot Law only provides for the form of ballots used at elections of officers, the form of ballot prescribed by another statute for use at a special election to determine the amount of a liquor license is not affected by the former act: *State* v. *City of Janesville*, (Supreme Court of Wisconsin,) 62 N. W. Rep. 933.

The Australian Ballot Law of Pennsylvania, (June 10, 1893,

P. L. 419, § 14,) does not repeal the acts providing a method and a ballot for an election on the question of increasing the debt of a township; the former section applies only to state questions: *Evans* v. *Willistown Township*, 3 D. R. 395. But the Ballot Law of Illinois, (June 22, 1891, § 16,) which prescribes the form of ballot for an election on the adoption of "a constitutional amendment or *other public measure*," has been held to repeal all other laws prescribing ballots and modes of voting in questions relating to municipal affairs: *County of Union* v. *Ussery*, 147 Ill. 204; S. C., 35 N. E. Rep. 618.

According to a recent decision of the Supreme Court of Nebraska, in *Woods* v. *McNerney*, 63 N. W. Rep. 23, (1) The officer charged with the preparation of the official ballot is given discretion in regard to the arrangement of the names, &c., so far as is not inconsistent with the spirit and purpose of the law, which discretion will not be interfered with by the court; and therefore (2) When the officer, in preparing the ballot, arranged the names of certain candidates, nominated by two parties, on single lines, thus:

Arrangement of Names

FOR LIEUTENANT-GOVERNOR.

JAMES N. GAFFIN, of Colon. Democrat and People's Independent.

he could not be mandamused to arrange them thus:

FOR LIEUTENANT-GOVERNOR.

JAMES N. GAFFIN. { People's Independent. / Democrat.

The Supreme Court of Illinois has lately ruled, that under the Australian Ballot Law of that state, (June 22, 1891, P. L. 108,) which provides that voting shall be by ballots printed and distributed at public expense, that no other ballots shall be used, and that the voter shall prepare his ballot by making a cross opposite the name of the candidate of his choice, or by writing in the name of the candidate of his choice in a blank space on said ticket, and making a cross opposite thereto, voters are not confined to the names printed on the official ballot, but may write thereon the name of any person for whom they wish to vote, and vote for that person: *Sanner* v. *Patton*, 40 N. E. Rep. 290.

Additional Names

The same court has also held, that when several independent candidates, nominated by petition, were placed in one column on the official ballot, headed "Citizen's Ticket," a voter, who marked the circle opposite that heading, voted for all the candidates in that column: *Murphy* v. *Battle*, 40 N. E. Rep. 470.

Marking

In a recent case in the Supreme Court of Montana, *Stackpole* v. *Hallahan*, 40 Pac. Rep. 80, the person nominated by a political convention as a candidate for the office of county treasurer sent his declination to the central committee, and no certificate of his nomination was ever filed with the county clerk. The committee, being empowered to fill vacancies on the ticket, nominated another candidate. The certificate of this second nomination failed to show the name of the person for whom such candidate was substituted, the cause of the vacancy, that he was nominated to fill a vacancy, or that the central committee had power to fill such vacancy. But as no objection on these grounds was made until after the election, the fairness of which was not questioned, the court held: (1) That the provisions of the Australian Ballot Law of that state, prescribing the facts to be stated in the certificate of nomination, and the manner in which a nomination may be declined, and the resulting vacancy filled, should not, under such circumstances, be held mandatory; and therefore, (2) The election was not invalid, though the statute requires that a candidate declining a nomination shall so notify the officer with whom his certificate of nomination is filed, in writing, and that the certificate of the nomination made to fill the vacancy shall state the cause of the vacancy, ... the name of the person for whom the new nominee is to be substituted, and the fact that the committee was authorized to fill vacancies.

Substituted Nomination, Certificate

The Supreme Court of Appeals of Virginia has just decided, that the statute of that state adopting the Australian Ballot System, (Act of March 6, 1894,) is constitutional, though it contains a provision that the time within which the elector must prepare his ballot shall be limited to two minutes and a half: *Pearson* v.

Voting, Limitation of Time

Board of Supervisors of Brunswick Co., 21 S. E. Rep. 483.

In the same case it was also held that in a provision that a sworn special constable, therein provided for "may" render assistance in preparing the ballot to an elector physically or educationally unable to vote, the word "may" is mandatory.

Assistance to Voter

The Supreme Court of the United States, in *Lem Moon Sing* v. *United States*, not yet reported, has decided, that the decision of the immigration officers in regard to the exclusion of an alien is conclusive, unless appealed from to the Secretary of the Treasury, as provided by law, and cannot be reviewed by the courts on *habeas corpus*.

Chinese Exclusion Law, Decision of Custom Officers

The Supreme Court of Illinois has recently held, in accord with the weight of authority, (1) That the courts have jurisdiction to decide as to the constitutionality of a legislative apportionment, though the question involves only political rights; and (2) That under a constitutional provision (Const. Ill. Art. 4, § 6,) which provides that "senatorial districts shall be formed of contiguous and compact territory, bounded by county lines, and containing, as nearly as practicable, an equal number of inhabitants, but no district shall contain less than four-fifths of a senatorial ratio," an apportionment act is valid, which bounds the districts by county lines, and creates no district containing less than four-fifths of the ratio, though it applies the rule of compactness to only a limited extent: *Peo.* v. *Thompson*, 40 N. E. Rep. 307.

Constitutional Law, Apportionment

In general, any gross violation of the constitutional requirements will render an apportionment act invalid: *e. g.*, a greater number of representatives than allowed by the constitution cannot be allotted: *State* v. *Francis*, 26 Kans. 724; if the constitution forbids the division of a county or district, an apportionment act which violates that prohibition is void: *State* v. *Cunningham*, 81 Wis. 440; S. C., 51 N. W. Rep. 724; and if there are any glaring inequalities of population or repre-

sentation, these will be taken as a sure indication that the legislature has transgressed the bounds of its discretion: *Peo.* v. *Canaday*, 73 N. C. 198; *Board of Supervisors of County of Houghton* v. *Blacker*, 92 Mich. 638; S. C., 52 N. W. Rep. 951; *Giddings* v. *Blacker*, 93 Mich. 1; S. C., 52 N. W. Rep. 944; *State* v. *Cunningham*, 83 Wis. 90; S. C., 53 N. W. Rep. 35; *Parker* v. *State*, 133 Ind. 178; S. C., 32 N. E. Rep. 836; 33 N. E. Rep. 119; *Ballentine* v. *Willey*, 2 Idaho, 1208; S. C., 31 Pac. Rep. 994. See *State* v. *Wrightson*, 56 N. J. L. 126.

The only case to the contrary is *Peo.* v. *Rice*, 135 N. Y. 473; S. C., 31 N. E. Rep. 921, which is discussed in 31 AM. L. REG. 851 *et seq.* When, however, the discretion of the apportioning power is properly exercised, as in the Illinois case, the apportionment is valid, though not mathematically exact: *State* v. *Campbell*, 48 Ohio St. 435; S. C., 27 N. E. Rep. 884.

The same rules apply to an apportionment made by a subordinate body in which that power is vested: *Peo.* v. *Board of Supervisors of Kings County*, 138 N. Y. 95; S. C., 33 N. E. Rep. 827; reversing 20 N. Y. Suppl. 470; *In re Baird*, 142 N. Y. 523; S. C., 37 N. E. Rep. 619; affirming 75 Hun, 545; S. C., 27 N. Y. Suppl. 535: *In re Whitney*, 142 N. Y. 531; S. C., 37 N. E. Rep. 621; affirming 75 Hun, 581; S. C., 27 N. Y. Suppl. 657.

Hours of Labor

According to a recent decision of the Supreme Court of Illinois, an Act which declares that "no female shall be employed in any factory or workshop more than eight hours in any one day, or forty-eight hours in any one week, is unconstitutional, on the ground that it deprives persons of property and liberty without due process of law: *Ritchie* v. *Peo.*, 40 N. E. Rep. 454.

Summary Conviction

A statute authorizing grand jurors, when assembled to investigate offences, to require a justice to commit to jail witnesses who refuse to answer proper questions, is not unconstitutional, on the ground that it authorizes the exercise of a judicial power by the executive department; nor on the ground that the recalcitrant witness is deprived of his liberty without due process of law; and the justice may commit such a witness, when required, without a

regular trial and judgment: *In re Clark*, (Supreme Court of Errors of Connecticut,) 31 Atl. Rep. 522.

Contract, Promissory Note, Consideration

The Supreme Judicial Court of Massachusetts has lately ruled, that when an accomodation note, given by the plaintiff to a corporation, was discounted, and not paid at maturity; and the defendant, who was a stockholder, director and creditor of the corporation, in consideration of the plaintiff's advancing him money to pay the note, gave the plaintiff his note for the amount advanced; that the defendant's note was supported by a valid consideration: *Abbott* v. *Doane*, 40 N. E. Rep. 197.

Restraint of Trade

According to the Supreme Court of Texas, a combination of dealers in beer, which secured control, by lease, of "all the cooling-room capacity for cooling beer" in a town, so that competition in the sale of beer would be kept out, is a combination in restraint of trade, and unlawful, under the statutes of that state, and the parties to it cannot recover for a breach of a contract, the performance of which would have enabled them to carry out their unlawful enterprise: *Anheuser-Busch Brewing Assn.* v. *Houck*, 30 S. W. Rep. 869, affirming 27 S. W. Rep. 692.

Corporations, Directors, Compensation

The Supreme Court of Montana has recently held, that when the by-laws of a corporation authorize the trustees or directors thereof to employ a superintendent, and fix his salary, a trustee, who is also secretary of the corporation, may recover on an implied contract for services rendered as superintendent, if such services are clearly outside his ordinary duties as secretary or trustee, and are performed under circumstances showing that it was well understood by the officers of the corporation, as well as by himself, that they were to be paid for: *Felton* v. *West Iron Mountain Mining Co.*, 40 Pac. Rep. 70.

Foreign Corporations, Comity

According to a late opinion of the Supreme Court of Delaware, a corporation is not a citizen, within the provisions of the Constitution of the United States, securing to a citizen of any state the rights, privileges and immunities guaranteed to the citizens of the several states;

and that therefore the usage of interstate comity does not warrant the issuance of a writ of mandamus to compel a domestic corporation to aid a foreign corporation, whose operations are expressly limited by its charter to the state where it was incorporated, to conduct its business in another state: *State* v. *Del. & Atl. Telegraph & Telephone Co.*, 31 Atl. Rep. 714.

Stock, Option to Lease, Proxy Voting

In a case recently decided by the Circuit Court of Appeals for the Fifth Circuit, *Zachry* v. *Nolan*, 66 Fed. Rep. 467, the plaintiff gave to the defendants an option for thirty days, in writing, to lease certain stock in a corporation owned by her, and at the same time gave them a proxy to vote on the stock. At a stockholders' meeting, held within the thirty days, the defendants offered to vote on the stock, and their right to do so being challenged, exhibited the proxy and the option as proof of their right, which proof was accepted, and their votes received. The plaintiff afterwards sued the defendants for the rent of the stock, specified in the option, as upon accounts stated, claiming that their acts in voting on the stock constituted an acceptance of the option. The trial court charged that these acts were an acceptance of the option; but the Court of Appeals held that this was error, and that the question was one for the jury to decide.

Criminal Law, Former Conviction, Bar

A verdict of guilty in a criminal case, set aside on the ground that it was contrary to the evidence, does not constitute a bar to a subsequent trial under the same indictment: *State* v. *Bowman*, (Supreme Court of Iowa,) 62 N. W. Rep. 759.

When a judgment, entered upon a verdict of guilty as charged in the indictment, on a trial of an indictment for murder, has been reversed on writ of error, because the verdict did not ascertain the degree of the crime, and a new trial has been awarded, the accused can be tried again upon the same indictment, and the second trial will not put him in jeopardy a second time for the same offence, within the meaning of the constitution: *Lovett* v. *State*, 33 Fla. 389; S. C., 14

So. Rep. 837. So, when, on appeal, a new trial is granted in a criminal case, on the ground that the judge below erred in submitting the case to the jury when there was not sufficient evidence to warrant it, the defendant cannot, on the new trial, plead former acquittal, for he was convicted in the court below, and the granting of a new trial is not an acquittal, nor can he plead former conviction, for it was set aside, and a new trial granted: *State* v. *Rhodes*, 112 N. C. 857; S. C., 17 S. E. Rep. 164. But the fact that an appeal is pending will not deprive the defendant of the bar, when the judgment is otherwise sufficient: *United States* v. *Olsen*, 57 Fed. Rep. 579.

The same rules apply when a verdict of guilty is set aside by the trial court, in its discretion, and a new trial granted; in such a case the plea of former jeopardy cannot be sustained: *State* v. *Lee*, (N. C.) 19 S. E. Rep. 375; *State* v. *Benjamin*, (La.) 14 So. Rep. 71.

Again, a conviction of murder, set aside at the instance of the defendant because of a defect in the information, is no bar to a subsequent trial and conviction for the same offence, in a new and valid information: *Peo.* v. *Schmidt*, 64 Cal. 260; S. C., 30 Pac. Rep. 814. A plea of former jeopardy to a persecution for arson, is not sustained by proof that there had been a mistrial, and that afterwards a new indictment was returned, either because the former indictment had been lost, or because the name of the owner of the property destroyed had been erroneously stated: *Thompson* v. *Commonwealth*, (Ky.) 25 S. W. Rep. 1059.

Similarly if, for any reason, the verdict is void, it cannot be set up as a bar to a subsequent prosecution for the same offence. Thus, the trial and conviction of a defendant in a federal court, which had no jurisdiction of the offence, will not bar a prosecution in the state court for the same offence: *Blyew* v. *Commonwealth*, 91 Ky. 200. And when one of the trial justices is related to the defendant within the prohibited degrees, and the conviction is set aside on that ground, and a new trial ordered, the former conviction is no bar to the second trial: *Peo.* v. *Connor*, 142 N. Y. 130; S. C., 36 N. E. Rep.

807; affirming 20 N. Y. Suppl. 209; S. C., 65 Hun. 392; 8 N. Y. Crim. Rep. 439.

But when the jury separates, after rendering a void verdict, the defendant, having been once in jeopardy, is entitled to be discharged, and cannot be tried again: *Jackson* v. *State*, (Ala.) 15 So. Rep. 351; and when the defendant is convicted of a lower offence than that charged in the indictment, which involves an acquittal of the higher offence, the fact that the conviction of the lower offence was set aside, and a new trial granted, at the instance of the defendant, will not entitle the state to place him on trial again for the higher offence: *Peo.* v. *Gordon*, 99 Cal. 227; S. C., 33 Pac. Rep. 901.

Criminal Law, Venue

One who, by false pretences, obtains goods ordered from a salesman, may be tried in the county from which the principal shipped them: *Commonwealth* v. *Karpowski*, (Supreme Court of Pennsylvania,) 31 Atl. Rep. 572.

Devise, Rule Against Perpetuities, Cy pres

The Supreme Court of New Hampshire, in a very able and learned opinion, has recently decided, that when a testator, in devising his estate in trust, provided that when the youngest of his grandchildren, born and unborn, should arrive at the age of forty years, the residue of the estate should be theirs,—that the invalidity of the devise to the grandchildren, as in violation of the rule against perpetuities, would not defeat it, but, under the doctrine of cy pres, the state would be allowed to vest in them, when the youngest reached the age of twenty-one: *Edgerly* v. *Barker*, 31 Atl. Rep. 900.

Duress, Threat to Prosecute

In the opinion of the Supreme Court of Nebraska, threats of prosecution and immediate imprisonment of the husband are sufficient to constitute duress, when used to induce a man and his wife to execute and deliver a mortgage upon their homestead, to secure the payment of a judgment against him, if they so overcome the wills of the mortgagors as to induce them to sign the mortgage, and thus execute a security which they would not have executed voluntarily; and the instrument so obtained is void:

Hargreaves v. *Korcek*, 62 N. W. Rep. 1086. See 1 AM. L. REG. & REV. (N. S.) 885.

Electric Railways, Poles, Contributory Negligence

A person who rides on the footboard of an electric street car is not required to anticipate danger from the close proximity of trolley poles to the track; and therefore his failure to listen for warnings, to watch out for such poles, given by the conductor, does not render him guilty of contributory negligence: *Elliott* v. *Newport St. Ry. Co.*, (Supreme Court of Rhode Island,) 31 Atl. Rep. 694.

Equity, Jurisdiction, Multiplicity of Suits

According to a recent decision of the Supreme Court of Oregon, equity has no jurisdiction, on the ground of avoiding a multiplicity of suits, of a suit to recover the several amounts due on a contract whereby the defendants, in consideration of the assignment of the several interests of the plaintiffs in an option on a mine, were to refund to each plaintiff the amount already advanced by him to develop the mine: *Van Auken* v. *Dammeier*, 40 Pac. Rep. 89.

Pleading Multifariousness

The Circuit Court for the Western District of Pennsylvania has lately held, in *Holton* v. *Wallace*, 66 Fed. Rep. 409, that a bill in equity, which sets up; (1) An alleged liability to a corporation of one person as an assignee of unpaid stock, and an alleged joint liability with him of five others, by reason of collusion with him to defraud creditors of the corporation; and (2) An alleged liability of five of the same defendants for fraudulent conduct in connection with a sale of the railroad belonging to the corporation;— is multifarious, as the two causes of action are distinct, presenting independent cases for relief, and require different proofs and different decrees.

Evidence, Life Tables, Effect

According to the Supreme Court of Michigan, when the plaintiff in an action for injuries resulting in death has introduced the mortality tables in evidence, and offers no other evidence to show that the probability of life of his decedent was greater or less than that.

shown by the tables, it is error to charge that the tables were not controlling, but should be given just such weight as the jury think proper: *Nelson* v. *Lake Shore & M. S. Ry. Co.*, 62 N. W. Rep. 993.

This, however, can only be true, if even when the verdict, as in this case, is so large as to show conclusively that the tables were disregarded altogether. When there is any other evidence in the case, bearing on the question, the tables are to be taken in connection with that: *City of Joliet* v. *Brewer*, (Supreme Court of Illinois,) 40 N. E. Rep. 619. See 2 AM. L. REG. & REV. (N. S.) 217; 36 Cent. L. J. 75.

Privileged Communications, Dentist

A dentist is not a surgeon, within the meaning of the Michigan statute, (How. St. § 7516,) and therefore communications made to him by a patient are not privileged: *Peo.* v. *De France*, (Supreme Court of Michigan,) 62 N. W. Rep. 709.

Garnishment, Stolen Property

The Supreme Court of Washington has lately ruled, in *Wooding* v. *Puget Sound Natl. Bank*, 40 Pac. Rep. 223, (1) That when a sheriff finds on the person of a prisoner a package of money, obtained by fraud from a bank, and the prisoner's mother voluntarily surrenders other packages similarly obtained, and each package is stamped with the name of the bank from which it was received, the sheriff may, with the consent of the parties from whom he took it, take possession of the money, and restore the same to the bank claiming it; and (2) That when money is taken from a person without his consent, by a person who acts as a trespasser in so doing, and is delivered by him to a third person who claims title thereto, it is not subject to garnishment in the hands of the sheriff, or of the parties to whom he delivered it, as the property of the person from whom it was taken.

Injunction, Property Fraudulently Attached

In a recent case, *Stewart* v. *Thomson*, not yet reported, the Court of Appeals of Kentucky has reasserted the familiar doctrine that a court of equity will enjoin proceedings on an attachment, fraudulently levied in another state, on property temporarily there, in

order to evade the exemption laws of the state of the defendant's residence.

Insurance, Total Loss

The Supreme Court of Nebraska has recently held, that in order to sustain the finding of a jury that a building destroyed by fire was a "total loss." it is not necessary that the evidence should show that the material of which the building was composed was reduced by the fire to smoke, cinders and ashes. It is sufficient if the building is rendered practically valueless as a building: *Ins. Co. of North America* v. *Bachler*, 62 N. W. Rep. 911.

A total loss does not mean an absolute destruction; and in reference to a building, the question is not whether all the parts and materials composing it are absolutely destroyed, but whether, after the fire, the thing insured exists as a building: *Williams* v. *Hartford Ins. Co.*, 54 Cal. 442.

When all the combustible material in a building is destroyed by fire, although portions of the brick walls are left standing, but so injured by the fire that they must be torn down, for the purpose of insurance the property is totally destroyed, but if the person insured should use the brick or other material not destroyed to rebuild, the company would be entitled to the value of the brick or other material: *German Ins. Co. of Freeport* v. *Eddy*, 36 Neb. 461; S. C., 54 N. W. Rep. 856.

Intoxicating Liquors, Civil Damage, Imprisonment of Husband

In a recent case in the Supreme Court of Pennsylvania, *Bradford* v. *Boley*, 167 Pa. 506; S. C., 31 Atl. Rep. 751, several interesting phases of the Civil Damage Law were discussed, and their legal effect determined. It was decided, (1) That the interest of a wife in her husband's earning power is not "property," within the meaning of the Civil Damage Act of Pennsylvania, (May 8, 1854, P. L. 663, § 3,) which declares that one who unlawfully furnishes intoxicating drinks to another shall be liable for injury to person or property occasioned by the furnishing; and she cannot therefore recover damages because of the imprisonment of her husband for an act committed while intoxicated:

(2) That the unlawful negligence of a liquor dealer in sell-

ing to an intoxicated person is not the proximate cause of the imprisonment of the latter for an act committed while he was intoxicated. The law intervenes, and becomes the proximate cause:

Proximate Cause

(3) That when a husband, on receiving his wages, was accustomed to deposit them with his wife, for family use and for safe-keeping, and then, when about to go on a spree, or during one, would apply to her for money to carry it on, she cannot be charged with contributory negligence in letting him have money from the deposit, so as to prevent her recovering damages from a liquor dealer for injuries caused by his unlawful furnishing of liquor to her husband, even though she knew his purpose when she let him have the money.

Contributory Negligence

The Supreme Court of New York, First Department, has recently decided, that under the statute of that state, (Laws, 1892, c. 602,) providing for the examination and licensing of master plumbers, the decision of the examining board in refusing to grant a license cannot be sustained, when it does not appear that rules of examination had been adopted, prescribing the subjects, and stating the percentage of questions which must be answered correctly to entitle the applicant to a certificate; and that a return to a certiorari to review the decision of the board is insufficient, which simply sets forth the questions asked the relator, and the answers made by him, without alleging that any of the answers were incorrect, and showing wherein they were incorrect: *Peo.* v. *Scott*, 33 N. Y. Suppl. 229.

License Laws, Examination, Review

In a dissenting opinion in the case of *Blomquist* v. *Chicago, M. & St. P. Ry. Co.*, 62 N. W. Rep. 818, Judge CANTY, of the Supreme Court of Minnesota, has laid down, according to the syllabus prepared by the court, "some novel and interesting principles by which to determine when the superior servant is a vice principal as to the inferior servant." These principles are an attempt to take a position on the vice principal question intermediate between the two extreme views on that subject which at

Master and Servant, Vice Principal

present prevail; and will probably, with some slight modifications form the rule as finally adopted. Judge CANTY's position, stated in his own words, is this: "It is held by a number of courts that the mere fact that the superior servant has power to hire, discharge and direct the inferior servant is alone sufficient to constitute the superior servant a vice principal as to the inferior servant; but it seems to me that it should require something more to give the superior servant that character. It is often the case that the inferior servant is more familiar than such foreman with the dangers to which he is exposed, and is better able to protect himself from those dangers than the foreman is to protect him; and yet without his fault, and by reason of exposure to those dangers, he may be injured through the negligence of the foreman. When the inferior servant knows and appreciates the dangers to be avoided, and is as well, or nearly as well, able to care for himself as the foreman is to care for him, he is substantially on an equal footing with the foreman, and in a better position than the master to look out for his own safety. In such a case the foreman is not a vice principal, but he and the inferior servant are fellow servants. On the other hand, when the servant does not know or does not appreciate the danger to be avoided, and from his grade or position cannot be expected to know or appreciate such danger, while a competent foreman should be required so to do, it is not good public policy to hold that the master is not liable for the negligence of the foreman, resulting in injury to the servant. It is very often the case that the prosecution of the work requires a very high degree of skill and experience in the foreman, and but little skill or experience in the inferior servant, who is neither hired nor paid to exercise the skill necessary for his own protection. If the position of the foreman is one which requires of him superior knowledge or skill, which cannot be required or expected of the inferior servant, but which is necessary for the protection of such inferior servant, then, in regard to the exercise of such superior knowledge or skill, the foreman is a vice principal. There must be something more in the inequality of the foreman and inferior servant than that which results alone from the one

having the authority to hire, discharge, and oversee the other. It is the actual disparity or inequality between them which should control, and the disparity which gives the foreman the character of vice principal must be substantial, not merely slight As far as I am able to discover, after much investigation, there are but two kinds of this disparity: (1) Disparity of knowledge; and (2) disparity of skill. Disparity of knowledge is where the foreman has or should have knowledge which the inferior servant neither has nor can be expected to have, the want of which knowledge on the part of such servant causes or contributes to his injury. Disparity of skill is where the foreman has or should have skill which the inferior servant neither has nor can be expected to have, the want of which skill on the part of such servant causes or contributes to his injury. The existence of such disparity of either or both kinds is a question of fact for the jury, and the burden is on the party asserting such disparity to prove it."

This is true, if it be modified by saying, that these facts, disparity of knowledge and disparity of skill, are to be taken in connection with the fact of the authority possessed by the foreman; and not as controlling the decision of the question, independent of the latter. It must also be understood that disparity of knowledge refers not to theoretical knowledge, but to practical knowledge of the conditions under which the inferior servant is then working. With these modifications, these rules are far preferable to any yet laid down for determining this vexed question.

Negligence, Licensee, Fireman

The Supreme Court of Rhode Island has recently held, that a member of the fire department is not an employe of the taxpayer of the municipality by which he is employed, in such a sense as to create an implied invitation from them to enter their premises to extinguish fires, so as to render them liable for personal injuries suffered by him in consequence of the dangerous condition of the premises, in a case where liability therefor would not otherwise exist: *Behler* v. *Daniels*, 31 Atl. Rep. 582.

The Court of Appeals of New York, in *Peo.* v. *Rathbone*, 40 N. E. Rep. 395, has affirmed the decision of the Supreme Court, reported in 32 N. Y. Suppl. 108, that a notary public is a public officer, within a constitutional provision that any public officer, elected or appointed to a public office, who shall travel on a free pass, shall forfeit his office.

Officer, Notary Public, Free Pass

According to a recent decision of the Court of Appeals of Maryland, a provision in partnership articles that the salaries of the members shall not be considered as losses sustained by the business, entitles a partner to his salary unconditionally; and therefore, when a partner left the monthly instalments of his salary in the hands of the firm, to be used for its benefit, he is entitled, in settling the partnership accounts, to interest on the several instalments from the time each became payable to him: *Keiley* v. *Turner*, 31 Atl. Rep. 700.

Partnership, Salary

The Supreme Court of the United States has lately ruled, that when the rights under a patent have been assigned to different persons for different states, a dealer in one state may purchase the patented articles of the assignee for another state, for the purpose of resale in his (the dealer's) state, and may sell them there without liability to the assignee for that state: *Keeler* v. *Standard Folding-bed Co.*, 15 Sup. Ct. Rep. 738. Chief Justice FULLER, and Justices BROWN and FIELD, dissented.

Patents, Territorial Assignments, Rights thereunder

According to the Supreme Court of Montana, under an act which provides that the board in which rests the power of allotting public contracts shall contract with the lowest responsible bidders therefor, the board has discretionary powers, and mandamus does not lie to compel it to award a contract to a bidder who, although the lowest, is, in its judgment, not responsible: *State* v. *Rickards*, 40 Pac. Rep. 210.

Public Contracts, Mandamus

A provision that a public contract shall be awarded to the

"lowest responsible bidder," is mandatory; but in ascertaining whether or not a bidder is responsible, the awarding body is required to deliberate and decide; in so doing its members exercise judicial functions; and therefore, however erroneous their decision may be, they cannot be compelled by mandamus to alter their determination: *Hoole* v. *Kinkcad*, 16 Nev. 217; *Commonwealth* v. *Mitchell*, 82 Pa. 343; *Douglass* v. *Commonwealth*, 108 Pa. 559; *Kelly* v. *Chicago*, 62 Ill. 279; *Peo.* v. *Dorsheimer*, 55 How. Pr. (N. Y.) 118. The same is true, when the board, though it has a rule to accept the lowest and best bid, reserves the right to reject any or all bids: *Anderson* v. *Board*, (Mo.) 27 S. W. Rep. 610. There is a full discussion of this subject in 1 AM. L. REG. & REV. (N. S.) 899.

Discretion

But when, by statute or charter, a public contract is to be awarded to the lowest bidder, "who shall give satisfactory proof of his or their ability to furnish the requisite materials and perform the work properly," the determination of the question as to who is the lowest bidder does not rest upon the exercise of an arbitrary, unlimited discretion by the board or official who is to award the contract, but upon the exercise of a *bona fide* judgment, based upon facts tending reasonably to the support of that determination. There must be a rational basis of fact to support this determination; but if this exists, the court will not weigh disputed evidence and facts in order to review the action of the awarding power: *State* v. *Board of Public Works of City of Trenton*, (Supreme Court of New Jersey,) 31 Atl. Rep. 613.

Religious Societies, Rules of Government, Res Judicata, Enforcement by Courts of Law

The Supreme Court of Nebraska, in *Pounder* v. *Ash*, 63 N. W. Rep. 48, has just decided a very interesting case on the subject of the conclusiveness of the decrees of an ecclesiastical tribunal acting within the bounds of its authority, and the power of the courts of law to enforce such decrees by appropriate proceedings. It held, overruling its former decision, in 36 Neb. 564; S. C., 54 N. W. Rep. 847, that when charges have been preferred against a minister of the gospel, and he has been adjudged guilty by the highest

tribunal of the church organization before which the matter has been presented, has been deposed from the ministry, and expelled from membership in the church, the courts of law will recognize such a judgment of the church tribunal, and enforce its observance, when regularly brought to their notice; and in an action for the purpose, will enjoin the one against whom it was rendered from further acting in the capacity of a minister, or enjoying the rights of a member of the particular church organization; and, when it further appears that the church property was conveyed to the organization or its trustees for church purposes, and in such a manner that it is subject to the control of the general association or governing power of the church, and its rules and laws, will also enjoin such person and member of the local congregation, or any others who have combined with him, from excluding from the church building and property, and from its use for any proper purpose, or from disturbing, in or during such use, any parties or ministers appointed to take charge of the congregation and church, by the then recognized and appointive power, disclosed to be such by the evidence in the case, or in so excluding and disturbing a presiding elder of the church from or in its proper occupancy or use, or any members in good standing who desire to worship therein in a regular manner, and according to the established rules and ordinances of the church.

Elections, Ballots

A vote on proposed amendments to a church constitution cannot be adjudged invalid, on a collateral attack in ejectment between adverse factions of a church to recover church property, on the ground that the ballots indicated unfairness, in that all contained the word "Yes," with directions that those voting in the negative must erase that word, and insert the word "No:" *Russie* v. *Brazzell*, (Supreme Court of Missouri,) 30 S. W. Rep. 526.

Constitution, Amendments

The constitution of a religious society, adopted by the general conference and acquiesced in for forty years, though never submitted to or ratified by the members of the society, and never fully recognized by the body of the church, nevertheless is the paramount law of the

society. and can be changed or repealed only as provided by the constitution itself, not by the conference or legislative body by which it was adopted: *Russie* v. *Brazzell*, (Supreme Court of Missouri,) 30 S. W. Rep. 526.

The Supreme Court of Illinois has reached substantially the same result, in *Kuns* v. *Robertson*, 40 N. E. Rep. 343.

Sale

The Supreme Court of North Carolina, in *State* v. *Wernwag*, 21 S. E. Rep. 683, has lately rendered a decision that seems hardly just. A city ordinance prohibited the sale of fresh meats within certain limits, without license. The manager of a hotel within the limit sent a telephone message to a butcher who lived outside the limit, ordering him to bring some fresh meats to the hotel, *at prices agreed on*. Accordingly, the butcher brought the meats to the hotel in his own wagon, and delivered them, receiving payment afterwards. This was held a violation of the ordinance, on the ground that the telephone order was executory, and the sale was consummated only upon delivery. The decision is supported by the following acute reasoning: "The plain meaning of the matter is this: The hotel manager sent a message to a seller of meats outside of the three-fourths mile limit. 'Bring me some fresh meats of a certain description. If they are such as I order, I will take them, and pay you for them; if they are not of the kind I order, I will not.' Surely, there is no sale in this."

Why not? It is true, that when the sale is completed only by delivery, it is to be regarded as made at the place of delivery: *Doster* v. *State*, 18 S. E. Rep. 997; or if delivered to a common carrier, that delivery is regarded as a constructive delivery to the buyer, and the sale is then complete: *State* v. *Flanagan*, 38 W. Va. 53. But it is difficult to see the reason for the distinction. The carrier is, to some extent at least, the agent of the seller, for the latter has the right of stoppage *in transitu*, which is often far more effective in its results than his absolute right of recall over his own delivery wagon would be. The rule has been adopted to make more efficient the laws restricting the liquor traffic; but however laudable the object, that alone is

no excuse for the exercise of a power that belongs properly to the legislature. Whatever the rights of the parties, the sale is either complete when the offer of one party is accepted by the other, or else not until the payment is made; and no merely utilitarian considerations can authorize the courts to fix it arbitrarily at the intermediate point of delivery.

Statute of Limitations, Adverse Possession

The Exchequer Division of Ireland has recently held, that when the owner of a house allowed his sisters to reside therein, contributed to their support, paid the rent and taxes, and executed all necessary repairs, their occupation was in the character of guests and not of tenants at will, and therefore the statute of limitations did not run against the owner: *Peakin* v. *Peakin*, [1895] 2 Ir. R. 359.

Statutes, Amendments, Constitutionality

The Supreme Court of Nevada has ruled, (1) That when the title of an act states that its subject is to amend one section of a former statute, the act cannot be extended to the amendment of other sections; but (2) If the sections of such an act, which attempt to amend other sections of a prior act than that mentioned in the title, are so separate and independent that one section can be made to operate in accordance with the intention of the legislature without the aid of the others, and the invalid sections have not constituted any inducement for the first, that section should be sustained, though the other sections are unconstitutional: *Ex parte Hewlett*, 40 Pac. Rep. 96.

According to the Supreme Court of Ohio, since an amended section of a statute takes the place of the original section, and must be construed with reference to the other sections, and they with reference to it, and since the whole statute, after the amendment, has the same effect as if re-enacted with the amendment, an unconstitutional statute may be amended into a constitutional one, so far as its future operation is concerned, by removing its objectionable provisions, or supplying others, so as to make it conform to the requirements of the constitution: *State* v. *City of Cincinnati*, 40 N. E. Rep. 508.

Subrogation, To Rights of Mortgagee

In a recent case in the Supreme Court of Michigan, *Draper* v. *Ashley*, 62 N. W. Rep. 707, a first mortgage of land had been foreclosed, without making the second mortgagee a party to the suit. The first bought in the land; but, before the equity of redemption expired, quitclaimed the land to the mortgagor in consideration of the amount due upon the mortgage. At the same time the mortgagor executed to the defendant, who had loaned him the money wherewith to redeem the land, a mortgage to secure the loan. Defendant's attorney, on examination of an abstract of title, had reported the title in the first mortgagee, on the supposition that the second mortgagee had been made a party to the foreclosure suit, and the loan was made by defendant in the belief that the second mortgage was cut off. Under these circumstances, the court held that the defendant should be subrogated to the rights of the first mortgagee, and entitled to priority over the second mortgage.

Sunday, Work of Necessity, Excursion Trains

The Court of Appeals of Kentucky has recently glorified itself by declaring that the running of an excursion train on Sunday is a work of necessity: *Louisville & N. R. Co.* v. *Commonwealth*, 30 S. W. Rep. 878. But it very prudently abstains from giving any reason why, other than that the company might deem it necessary. It would have been wiser still to have refrained from giving this.

The running of trains by a railroad company on Sunday is within the prohibition of a statute which punishes any person who labors in his calling on the Sabbath day, or employs his servants in so doing, except in works of necessity or charity: *State* v. *Railroad Co.*, 24 W. Va. 783. This applies to railroads engaged in interstate commerce, as well as to those which carry on purely domestic traffic: *State* v. *Railroad Co.*, 24 W. Va. 783; *Hemmington* v. *State*, 90 Ga. 396; S. C., 17 S. E. Rep. 1009, *contra*; *Norfolk & W. R. R. Co.* v. *Commonwealth*, (Va.) 13 S. E. Rep. 340.

According to the Supreme Court of New York, a name

such as "granite," used to designate a patented article, takes upon it the same nature as the patent, becomes public property on the expiration of the patent, and can be used by the public in connection with that article; and the manufacturer is not entitled to the exclusive use of it thereafter, as a common law trade-mark, though such might have been the case, if used in connection with a non-patented article: *St. Louis Stamping Co.* v. *Piper*, 33 N. Y. Suppl. 443.

Trade Mark, Designation of Patented Article

Among the various absurd rules of the common law, to which the courts still cling with a pertinacity like that of the drowning man in the proverb, is that which permits the presumption of having issue to continue till the possibility of it, within the knowledge of the medical profession, is long past. If, as Lord COKE asserts, "the law seeth no impossibility of having children," when a man and his wife are each of them one hundred years old, then is the law not that perfection of human reason that some would fain have us believe, but rather a certain agglomeration of arbitrary rules designed more nicely for the accommodation of judges in the speedy determination of causes, than for the exact furtherance of justice betwixt man and man. Without discussing the propriety of the results obtained by its application in some cases, which might be obtained equally well in other ways, it may be said that the grossest injustice is caused by its application to cases in which the word issue, when used in reference to a woman physically incapable of childbearing, who had no legitimate child, is yet held not to include illegitimates, in the absence of other words in the will. The latest instance of this is to be found in *Flora* v. *Anderson*, 66 Fed. Rep. 182, decided by the Circuit Court for the Southern District of Ohio, Western District. One Longworth devised part of his estate in trust for his daughter for life, with remainder to the issue of her body surviving her. At the time the will was made the daughter had no legitimate issue, and was nearly fifty years of age. After her death, one Flora, alleged to be an illegitimate child of the said daughter, claimed

Wills, Issue, Illegitimates,

the remainder. But the court held (1) That a devise to "issue ' means *prima facie* legitimate issue, and an intention to include illegitimates must appear from the will itself, without resort to extrinsic evidence: (2) That it was conclusively presumed that it was possible that the daughter might have issue at any time during her life: and therefore (3) That it was not competent to prove that she was past the age of child-bearing when her father's will was made, for the purpose of showing that her father must have had an illegitimate child in view, in creating the remainder to her issue.

No intelligent man doubts that such was the case; it is hardly likely that the court itself doubted it; but *ita lex sciapta est;* it is so much easier to stand on authority than to be independent, even if justice must thereby remain blind.

Revocation, Adoption of Child

An adopted child is not "issue of the marriage," within the meaning of § 1298 of the Civil Code of California, providing that if a testator marry, and have issue of such marriage, his former will is revoked: *In re Comassi's Estate*, 40 Pac. Rep. 15.

The adoption of a child does not revoke an antecedent will of the adopting parent, under the laws of Indiana: *Davis* v. *Fogle*, 124 Ind. 1; S. C., 23 N. E. Rep. 860.